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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 JAMES JOSEPH BRUNDAGE,

12 Petitioner,

13 v.

14 STATE OF WASHINGTON,

15 Respondent.

CASE NO. C10-5718RJB

ORDER ADOPTING REPORT AND
RECOMMENDATION, DENYING
PETITION FOR WRIT OF HABEAS
CORPUS, AND DENYING A
CERTIFICATE OF
APPEALABILITY

16 This matter comes before the court on the Report and Recommendation of the Magistrate
17 Judge. Dkt. 29. The court has considered the relevant documents and the remainder of the file
18 herein.

19 On May 25, 2011, the Magistrate Judge issued a Report and Recommendation,
20 concluding that all but one of petitioner's claims were unexhausted and procedurally barred, and
21 that his exhausted claim was without merit. Dkt. 29. The court has reviewed the record *de novo*.
22 While the court agrees with the recommendation of the Magistrate Judge, this order will provide
23 additional analysis of the claims.

24 ORDER ADOPTING REPORT AND
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1 **1. Unexhausted Claims**

2 The court has numbered petitioner's claims, for ease of reference. The numbers
3 correspond to the claims petitioner appears to have raised in the petition.

4 *Claim 2 (Dkt. 1-4, at 1):* Ineffective Assistance of Counsel for not objecting to the lesser-
5 included instructions. This claim was not included in petitioner's thirty page brief to the
6 Washington Supreme Court in his personal restraint proceedings. Although petitioner included
7 some argument on this issue in the exhibits and appendices to the thirty page brief, the
8 Washington Supreme Court addressed only what was included in his brief, after giving petitioner
9 explicit instructions to file a brief of thirty pages. The claim is, therefore, unexhausted and
10 procedurally barred.

11 *Claim 3 (Dkt. 1-5, at 1):* Ineffective assistance of counsel for failure to cross examine
12 404(b) witness JLF, also known in the record as JLC: This claim was not raised before the
13 Washington Supreme Court as a violation of petitioner's constitutional rights. The claim is
14 unexhausted and procedurally barred.

15 *Claim 4 (Dkt. 1-6, at 1):* Prosecutorial Misconduct for showing photographs of the
16 victim tied to a 4x4: This claim was not raised before the Washington Supreme Court as a
17 violation of petitioner's constitutional rights. The claim is unexhausted and procedurally barred.

18 *Claim 5 (Dkt. 1-2, at 1-12):* Ineffective Assistance of counsel for failure to present a trial
19 brief and motions *in limine*, and for failure to object at trial to improper comments regarding Mr.
20 Brundage's post-arrest silence. Petitioner presented the ineffective assistance of counsel claim to
21 the Washington Supreme Court as an evidentiary error, not an ineffective assistance of counsel
22 claim. Petitioner did not present this claim to the Washington Supreme Court in his motion for
23

1 discretionary review. Because this claim was not raised before the Washington Supreme Court as
2 a violation of petitioner's constitutional rights, the claim is unexhausted and procedurally barred.

3 **2. Exhausted Claims**

4 *Exhausted Claims.* In *Claim 1 (Dkt. 1-2, at 5, and 1-3, at 1)*, petitioner contends that his
5 trial counsel was ineffective for telling the jury to discount his testimony. This claim was
6 exhausted. It is unclear whether the Magistrate Judge concluded that petitioner had exhausted
7 *Claim 2 (Dkt. 1-4, at 1)*: that petitioner's counsel was ineffective for telling the jury to find
8 petitioner guilty of the lesser-included offenses of Second Degree Rape , Second Degree
9 Kidnapping, and seven counts of violating a no-contact order. It appears that this claim was
10 exhausted because the Washington Supreme Court addressed the claim on the merits in
11 petitioner's personal restraint proceedings. The court will address both of these claims on the
12 merits.

13 *Legal Standard.* In order to establish ineffective assistance of counsel, a petitioner must
14 show that counsel's representation fell below an objective standard of reasonableness and that the
15 deficient performance affected the result of the proceeding. *Strickland v. Washington*, 466 U.S.
16 668, 686 (1984). There is a strong presumption that counsel's conduct falls within the wide range
17 of reasonable professional assistance. *Strickland*, 466 U.S. at 689. In order to demonstrate
18 prejudice, the defendant must show there is a reasonable probability that but for counsel's
19 unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694. A
20 "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
21 *United States v. Bagley*, 473 U.S. 667, 682 (1985).

22 Under the first prong of the *Strickland* test, the question is whether counsel's assistance
23 was reasonable under the totality of the circumstances, viewed as of the time of counsel's

1 conduct. *Strickland*, 466 U.S. at 690. To succeed under the first prong, the petitioner must show
2 the attorney's conduct reflects a failure to exercise the skill, judgment, or diligence of a
3 reasonably competent attorney. *United States v. Vincent*, 758 F.2d 379, 381 (9th Cir.), *cert.*
4 *denied*, 474 U.S. 838 (1985).

5 Under the second prong, the petitioner must demonstrate prejudice, that but for counsel's
6 unprofessional errors, the result would have been different. *Strickland*, 566 U.S. at 694.
7 However, sheer outcome determination is not sufficient to make out a Sixth Amendment
8 violation; a proper prejudice inquiry focuses on whether counsel's errors or omissions rendered
9 the proceeding fundamentally unfair or the result unreliable. *Lockhart v. Fretwell*, 113 S.C. 838,
10 842-44 (1993).

11 *State Court Decisions.* The state courts reviewed these claims in petitioner's personal
12 restraint proceedings. First, the Washington Court of Appeals considered petitioner's claims and
13 rejected them as follows:

14 As to counsel's argument during closing argument that the jury should discount some of
15 Brundage's statements, those arguments were a strategic decision taken to minimize the
16 effects of some statements that Brundage had made. Such strategic decisions do not
17 constitute deficient performance. *In re Personal Restraint of Davis*, 152 W.2d 647, 720, 101
18 P.3d 1 (2004).
19 Exhibit 17 at 2.

20 In denying petitioner's petition for discretionary review, the Washington Supreme Court
21 stated as follows:

22 It is readily apparent that defense counsel had sound tactical reasons for acknowledging Mr.
23 Brundage's credibility issues and his violation of court orders. Mr. Brundage gave conflicting
24 stories, and he admitted contacting his spouse in clear violation of court orders. Counsel was
making the best of a bad situation, bolstering Mr. Brundage's remaining credibility by way of
candor to the jury. Moreover, in light of the evidence against Mr. Brundage, counsel had a
tactical basis for emphasizing lesser included alternatives to the jury in order to defeat
conviction of greater charges. Counsel was somewhat successful in that regard because the
jury convicted Mr. Brundage of the lesser charges of second degree rape and second degree
kidnapping. And Mr. Brundage seemingly acknowledges the jury was properly instructed

1 that counsel's argument was not evidence and that the jury had to find beyond a reasonable
2 doubt that he committed the crimes alleged. In sum, Mr. Brundage cannot base his
ineffectiveness claim on those tactical decisions. *See State v. Hendrickson*, 129 Wn.2d 61,
77-78, 917 P.2d 563 (1996)

3 Dkt. 20, Exhibit 22, at 2.

4 *Review of the Record.* Petitioner contends that his counsel was ineffective for telling the jury
5 to discount his testimony; and for telling the jury to find him guilty of lesser-included offenses and of
6 violation of the court's no contact order.

7 Petitioner first claims that counsel was ineffective for telling the jury to discount his
8 testimony. The question under *Strickland* is whether the statements petitioner's counsel made
9 during closing argument were reasonable under the totality of the circumstances. In the context
10 of the case, the record shows that petitioner's counsel attempted to mitigate as much as possible
11 petitioner's potential liability for the crimes that were charged.

12 The record shows that petitioner gave conflicting testimony about what he had told detectives
13 before or at the time of his arrest, and at trial. See Dkt. 20, Exh. 29, Report of Proceedings, March
14 27, 2008, Vol. II, at 331-373; Dkt. 20, Exh. 29, Report of Proceedings, March 20, 2003, Vol. V, at
15 865-868. During his closing argument, petitioner's counsel tried to minimize the damage of the
16 statements petitioner had made to detectives, as follows:

17 What do we know about that statement? It was six hours long, probably quite grueling for the
18 detectives but certainly for Mr. Brundage. He had been in the woods for two weeks. He was
cold, he was presumably hungry, and he was certainly upset, he was emotional at times. He
19 testified that he felt like he was just kind of out of it. He just wanted to get out of the jail
setting, out of the cold holding cell where they wouldn't give him so much as a blanket and
20 go downstairs to a nice warm sheriff's office and sit down with two police officers and have
a soda, warm up, and get a blanket. I would argue to you that the statement that Mr.
21 Brundage gave to the Bremerton Police Department needs to be closely scrutinized. We need
to look at exactly what he said, how it changes over time, some instances what he said is
22 worse than what he said in court and some instances what he said is better for him than what
he said in court. At some points he says he doesn't remember. He is literally all over the
23 board when he talks to those two detectives and because of that and because of his state of
mind I will ask you to a significant degree to discount the statement that he made to those

1 two detectives. Certainly to weigh what he said against what we know, to see if any of it is
2 corroborated.

3 Dkt. 20, Exhibit 29, Report of Proceedings, March 21, 2003, Vol. VI, at 960-61.

4 As a result of his direct and cross examination, petitioner's counsel could reasonably
5 have been concerned about the negative effect of this testimony on the jurors, particularly
6 inconsistencies with prior statements, admissions, and testimony of which a jury might be
7 skeptical. *See* Dkt. 29, Exh. 29, Report of Proceedings, March 20, 2003, Vol. V, at 752-883; and
8 826-827. During his closing argument, defense counsel challenged the credibility of the victim.

9 In discussing petitioner's testimony, petitioner's counsel stated as follows:

10 Testimony of Mr. Brundage, we already covered this a little bit, it's basically been all over
11 the board. I suggest it's of very limited value. His testimony and conversation with Detective
12 Schultz and Davis, very limited value, he's troubled, he's emotional, he is fixated, he is
13 obsessive, he is compulsive, he has serious emotional problems and he may not really know
the truth. The truth in his mind may be something different than it was six months ago. The
truth in his mind may be something different from what he told Detective Schultz. He may
not even know because of the emotional crisis he is in what the truth is anymore. He may be
that confused. His testimony needs to be discounted.

14 Dkt. 20, Exh. 29, Report of Proceedings, March 21, 2003, Vol. VI at 981. In the context of the trial,
15 defense counsel's decision to minimize the impact of problematic statements petitioner made to
16 detectives was a reasonable tactical decision. As the Washington Supreme Court stated, defense
17 counsel's remarks were an attempt to make the best of a bad situation by bolstering petitioner's
18 remaining credibility by way of candor to the jury. Further, defense counsel made a reasonable
19 tactical decision to discount the statement of the victim while focusing the jury away from
20 petitioner's testimony.

21 Petitioner's second exhausted claim is that his counsel was ineffective for telling the jury to
22 find him guilty of the lesser-included offenses of Second Degree Rape , Second Degree
23 Kidnapping, and seven counts of violating a no-contact order. In his testimony, petitioner

1 admitted to writing letters and making phone calls to his wife from jail. Dkt. 20, Exh. 29, March 21,
2 2003, Vol. VI at 956. Conceding that petitioner had violated a no contact order could reasonably
3 enhance counsel's credibility before the jury when counsel discussed the more serious charges.

4 Further, throughout the closing argument (Dkt. 20, Exh. 29, Report of Proceedings, March
5 21, 2003, Vol. VI, at 954-987), defense counsel argued against the rapes at the Cove Cottage hotel,
6 and against the handgun and shotgun possession charges. Dkt. 20, Exh. 29, Report of Proceedings,
7 March 21, 2003, Vol. VI, at 958-959. Petitioner's counsel focused on how first degree kidnapping
8 charges were not proved by the State, and emphasized that the evidence pointed to the second degree
9 kidnapping . Dkt. 20, Exh. 29, Report of Proceedings, March 21, 2003, Vol. VI at. 957-958. Defense
10 counsel could not escape the fact that the State had proved, at a minimum, that second degree
11 kidnapping and intercourse had occurred. Defense counsel could also not credibly argue that
12 petitioner was innocent of violating the court's no contact order. The tactical decision to discount the
13 credibility of the victim (Dkt. 20, Exh. 29, Report of Proceedings, March 21, 2003, Vol. VI at. 957-
14 968-979), and to focus away from petitioner's conflicting, and often damaging, testimony, in order to
15 decrease the culpability of petitioner, was reasonable. The jury found petitioner guilty of second
16 degree rape and kidnapping, not first degree, and several counts were dismissed.

17 In the context of the evidence in the case, the decisions of petitioner's counsel to decrease the
18 impact of petitioner's testimony and prior statements, and to focus in closing argument on attacking
19 the first degree rape and kidnapping decisions, were reasonable. Petitioner has not shown that his
20 counsel's conduct reflected a failure to exercise the skill, judgment, or diligence of a reasonably
21 competent attorney. Further, petitioner has not shown that, but for counsel's unprofessional
22 errors, the result would have been different.

23 Petitioner has not shown that the claims adjudicated on the merits in the Washington
24 State courts resulted in a decision that was contrary to, or involved an unreasonable application

1 of, clearly established federal law, as determined by the Supreme Court; nor has he shown that
2 the State court decisions resulted in a decision that was based on an unreasonable determination
3 of the facts in light of the evidence presented to the state courts. *See* 28 U.S.C. §2254(d).

4 **3. Certificate of Appealability**

5 The Magistrate Judge concluded that petitioner is not entitled to a Certificate of
6 Appealability. Dkt. 29, at 11. After a review of the record, the court concurs with the
7 recommendation of the Magistrate Judge. Petitioner has not met the requirements for obtaining a
8 Certificate of Appealability. A Certificate of Appealability should be denied.

9 Accordingly, it is hereby **ORDERED** that the Report and Recommendation of the
10 Magistrate Judge (Dkt. 29) is **ADOPTED**, with the addition of the analysis herein. The Petition
11 for Writ of Habeas Corpus is **DENIED**. A Certificate of Appealability is **DENIED**.

12 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
13 to any party appearing *pro se* at said party's last known address.

14 Dated this 23rd day of June, 2011.

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17 ROBERT J. BRYAN
18 United States District Judge
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